

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION FOUR**

**DREXEL UNIVERSITY**

**Employer**

**and**

**Case 04-RC-271435**

**TEAMSTERS UNION LOCAL NO. 115 a/w  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The sole issue in this proceeding is whether to conduct an election manually or by mail ballot. The Employer, Drexel University, contends that the election should be conducted manually, while Petitioner, Teamsters Union Local No. 115, favors a mail-ballot election. After reviewing and considering the arguments of the parties, for the reasons discussed below, I find that a mail-ballot election is appropriate.

Petitioner filed a petition under Section 9(c) of the National Labor Relations Act (the Act), and a hearing was held by videoconference before a Hearing Officer of the National Labor Relations Board (the Board).<sup>1</sup> At the hearing, the parties reached stipulations with respect to all litigable issues, including the composition of the voting unit. Although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Regional Director, the parties were permitted to make oral arguments at the hearing and file post-hearing briefs regarding their positions as to the mechanics of the election. Both parties filed briefs.

**I. Factual Overview**

The Employer is a private non-profit educational institution in the city of Philadelphia, Pennsylvania, which is coextensive with Philadelphia County. The parties agreed to an election in a unit of about 19 employees employed by the Employer, including Senior Residential Desk Coordinators, Residential Desk Coordinators, and the Stiles Hall Office Assistant.

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. To date, there have been more than 27 million confirmed cases of COVID-19 in the United States and over 498,000 deaths.<sup>2</sup> The United States has experienced a widely shifting transmission rate, including sharp upticks in confirmed cases

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<sup>1</sup> All dates occurred in 2021 unless otherwise noted.

<sup>2</sup> COVID Data Tracker Maps, charts, and data, February 22, 2021, [CDC COVID Data Tracker](https://covid19.com/).

after periods of lower transmission. In the seven days before February 22, the nation has seen 541,698 new COVID-19 cases.<sup>3</sup>

In the Commonwealth of Pennsylvania, there have been a total of 915,018 cases confirmed and probable COVID-19 cases reported.<sup>4</sup> The state currently mirrors the downward daily trend of reported cases nationwide, but the pandemic remains at a dangerous level. Thus, the Pennsylvania Department of Health reports that the 7-day moving positivity rate from February 12 to February 18 for the state was 6.5%, a decrease from the 8.0% rate in the previous 7 days.<sup>5</sup> John Hopkins University's most recent data reports that the Pennsylvania 7-day moving positivity rate is at 7.1%<sup>6</sup> and includes Pennsylvania in a list of states above the recommended positivity rate.<sup>7</sup> The positivity rate for the past month has been reported at 9.08%.<sup>8</sup>

Data as to the positivity rate for Philadelphia differs depending on the source. The Pennsylvania Department of Health reports the Philadelphia County positivity rate at 5.2% during the 7 days from February 12 to February 18.<sup>9</sup> The Department of Public Health of the City of Philadelphia reports the positivity rate at 4.2%<sup>10</sup> and states that there is a "high risk of community transmission."<sup>11</sup> The federal Centers for Disease Control and Prevention (CDC) reported the 7-day moving average positivity rate in the County of Philadelphia on February 19 as 4.28%.<sup>12</sup> The difference between these varying positivity rates data cannot be explained, except that in the absence of federal standards for reporting COVID-19 testing data, there are several ways to calculate test positivity and the results can differ depending on which approach is used.<sup>13</sup>

Recently, new variant strains of COVID-19 have emerged, and the CDC is monitoring them. The CDC has stated that these variants, "have mutations in the virus genome that alter the characteristics and cause the virus to act differently in ways that are significant to public health (e.g., causes more severe disease, spreads more easily between humans, requires different

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<sup>3</sup> Id.

<sup>4</sup> [Pennsylvania Data \(pa.gov\)](#) last updated February 22, 2021.

<sup>5</sup> [COVID-19 Early Warning Monitoring System Dashboard \(pa.gov\)](#) last updated February 19, 2021.

<sup>6</sup> [Daily Testing Trends in Pennsylvania - Johns Hopkins \(jhu.edu\)](#) last updated on February 22, 2021.

<sup>7</sup> [Which U.S. States Meet Recommended Positivity Levels? - Johns Hopkins Coronavirus Resource Center \(jhu.edu\)](#) last updated on February 22, 2021.

<sup>8</sup> [Pennsylvania - COVID-19 Overview - Johns Hopkins \(jhu.edu\)](#) last visited February 22, 2021.

<sup>9</sup> [COVID-19 Early Warning Monitoring System Dashboard \(pa.gov\)](#) last updated February 19, 2021.

<sup>10</sup> [Testing and data | Department of Public Health | City of Philadelphia](#) last updated February 18, 2021.

<sup>11</sup> [Coronavirus Disease 2019 \(COVID-19\) | Department of Public Health | City of Philadelphia](#) last updated on February 18, 2021 at 2:00 p.m.

<sup>12</sup> [CDC COVID Data Tracker](#) last visited February 22, 2021.

<sup>13</sup> [Changes to Test Positivity Tracking Efforts - Johns Hopkins Coronavirus Resource Center \(jhu.edu\)](#)

treatments, changes the effectiveness of current vaccines).”<sup>14</sup> Variant strains have been detected in Philadelphia and surrounding areas during the past few weeks. In fact, cases of a new strain from the United Kingdom were reported earlier this month at the University of Pennsylvania, which has a campus adjacent to the Employer’s main campus.<sup>15</sup> The CDC is also tracking variant strains from South Africa and Brazil.

## **II. Position of the Parties**

The Employer advocates for a manual election, emphasizing the Board’s longstanding policy favoring such elections. The Employer asserts that there are problems with reliability in mail-ballot elections, citing several newspaper articles and other media reports of delivery delays by the United States Postal Service in December 2020 and January 2021. With respect to the prevalence of COVID-19 in Philadelphia, the Employer maintains that the Region should focus on the positivity rate on the Employer’s campus, which it claims is below 1%. The Employer offered to comply with the guidelines suggested by the General Counsel Memorandum 20-10 regarding conducting manual elections amidst the pandemic.

Petitioner asserts that a mail-ballot election should be conducted because the positivity rate in Philadelphia is more than 5%.<sup>16</sup> Additionally, Petitioner argues that relevant local government restrictions seek to avoid gatherings among individuals who are not part of the same household.

## **III. Analysis of Board Law and Application**

The Board has held that the mechanics of an election, such as the date, time, and place, are left to the discretion of the Regional Director. *CEVA Logistics U.S., Inc.*, 357 NLRB 628 (2011); *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998).

Section 11301.2 of the Board’s Casehandling Manual (Representation) provides, in part:

The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to

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<sup>14</sup> <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html>

<sup>15</sup> <https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.inquirer.com%2Fnews%2Fcoronavirus-covid-19-variant-philly-montco-pa-nj-vaccine-20210211.html&data=04%7C01%7C%7Cbe768e0a388a4d34d64a08d8d80e2734%7C5e453ed8e33843bb90754ed5b8a8caa4%7C0%7C0%7C637496902610451384%7CUnknown%7CTWFpbGZsb3d8eyJWljiOiMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6Ikl1haWwiLCJXVCi6Mn0%3D%7C1000&data=n011MA4RPgn4orcPoYvYC9YKycVfFXgbWijdUsBHHow%3D&reserved=0>

<sup>16</sup> Petitioner made this assertion at the hearing and in its brief prior to a decline in the Philadelphia positivity rate. In its initial petition and response to the Employer’s Statement of Position, Petitioner had previously sought a manual election.

vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Casehandling Manual indicates that a Regional Director may use discretion to order a mail-ballot election where conducting an election manually is not feasible, and that under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. See *San Diego Gas and Electric*, 325 NLRB 1143 (1998). As the Board noted in *London's Farm Dairy*, 323 NLRB 1057 (1997), “[f]rom the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail.” Indeed, the Board has previously rejected arguments that mail-ballot elections are inherently less secure and that they would likely result in voter coercion. See *San Diego Gas & Electric*, supra at 1146 (1998); *London's Farm Dairy*, 323 NLRB at 1058. There are well-established procedures for conducting effective mail-ballot elections set forth in the Casehandling Manual at Section 11336, et seq.

On July 6, 2020, the Board’s General Counsel issued GC 20-10 to provide guidance for conducting manual elections during this pandemic. The memorandum detailed numerous manual election protocols to minimize the risk of COVID-19 transmission. It also reaffirmed that Regional Directors have authority delegated by the Board to make initial decisions about when, how, and in what manner all elections are conducted.

Thereafter, on November 9, 2020, the Board issued its Decision on Review in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), wherein it “set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of Covid-19.” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 4. The Board identified the following six situations which suggest the propriety of using mail ballots to conduct elections:

- (1) [t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status ...
- (2) [e]ither the 14-day trend in the numbers of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher ...
- (3) [t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size ...
- (4) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols ...
- (5) [t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status ...
- (6) [o]ther similarly compelling considerations.

The Board did not give increased weight to any of the factors and specifically found that only one factor need be present. *Id.* The Board stated that, “[i]f one or more of these situations is present,

that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” *Id.*, slip op. at 4. The Board stated that a Regional Director who exercises his or her discretion to direct a mail-ballot election when one or more of these situations exists will not have abused this discretion. *Id.*, slip op. at 8.

The second parameter is the presence of either a 14-day trend of increasing cases, or a 14-day testing positivity rate above 5%, in the county where a manual election would be held.<sup>17</sup> The recent trend in Philadelphia is for a decreasing, not an increasing number of cases. But, as discussed above, the positivity rate in the state of Pennsylvania is higher than 6%, while the positivity rate in Philadelphia varies between 4.2% and 5.2% depending on how the rate is calculated. Thus, it cannot be precisely determined whether the relevant rate is higher than the 5% guideline set forth in *Aspirus Keweenaw*, so the second parameter may not be applied mechanically.

In addition to the five specified parameters set forth in *Aspirus Keweenaw*, the sixth guideline indicates that if “other similarly compelling considerations, are present,” a Regional Director should consider directing a mail-ballot election. In this case, the relevant circumstances are sufficiently compelling to order a mail-ballot election even if it cannot clearly be established that the 5% positivity rate standard has been met. Thus, there are variant strains of COVID-19 in the area that may be more virulent and damaging than the standard version of the virus, and it is impossible to determine how quickly these strains will spread in the near future.<sup>18</sup> The City of Philadelphia continues to state on its official website that there is a “high risk of community transmission” from COVID-19. The spread of the disease has fluctuated during the past year, and it cannot be confidently predicted that rates will continue to trend downward, especially considering the presence of the variant strains that are generally noted for their high transmission rates. In these uncertain circumstances, where the positivity rate is currently near or above 5%, an interest in public safety indicates the propriety of a mail-ballot election.

The Employer argues that the positivity rate on its campus should be determinative, rather than the positivity rate in Philadelphia, and asserts that this rate is less than 1%, based on its own testing. However, the Board in *Aspirus Keweenaw* stated that county-level data is its “preferred metric.” Although the Board indicated that city-level or other intracounty data may be more relevant where “the county covers a large geographic area or has widely varying Covid-19 rates,” these circumstances are not present here. Moreover, the Board stated that where intracounty data is more relevant, it should be “from official state or local government sources,” and the Employer has not cited such sources. *Aspirus Keweenaw*, supra, slip op. at p. 6, fn. 26; see also *Amazon.com Services LLC*, 10-RC-269250 (February 5, 2021) (not reported in Board volumes). In this case, data from Philadelphia is most relevant because employees, observers, party representatives, and

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<sup>17</sup> Subsequent to the Board’s *Aspirus Keweenaw* decision, the available state and city statistics have been compiled on a 7-day basis, not a 14-day basis.

<sup>18</sup> The *Aspirus Keweenaw* decision, which issued in November 2020, did not account for the variant strains of the disease as they were not well-known or prevalent at that time, and the Board has not yet had occasion to discuss what effect, if any, these new developments should have on determining whether to conduct mail ballot or manual elections.

Board agents are unlikely to confine themselves to the campus and in their daily life, they may be exposed to areas with more representative positivity rates.

The Employer's argument against the efficacy of mail ballot elections is also unavailing. As previously mentioned, the Board has rejected arguments that mail-ballot elections are less secure. As to the efficiency of the United States Postal Service, the articles cited by the Employer regarding potential delays pertained to the holiday season, when there was a significant increase in demand for mail services resulting in delayed deliveries. The holiday season has since ended and should not affect the mailing of ballots in this matter.

While longstanding Board policy favors manual elections, mail-ballot elections remain appropriate where manual elections are rendered potentially unsafe by circumstances caused by this pandemic. In this case, for the reasons discussed above, I find that a mail-ballot election is warranted.

### **CONCLUSION**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is a private non-profit educational institution with an office and place of business located in Philadelphia, Pennsylvania. During the past 12 months it received gross revenues in excess of \$1,000,000 and purchased and received goods and services valued in excess of \$5,000 directly from points outside the Commonwealth of Pennsylvania. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein, and there is no contract bar or other bar to an election in this matter.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

***Included:*** All full-time and regular part-time Senior Residential Desk Coordinators, Residential Desk Coordinators, and the Stiles

Hall Office Assistant employed by the Employer at its University City and Center City locations in Philadelphia, Pennsylvania.

***Excluding:*** All other employees, students (including but not limited to those engaged in a federal work study program), office clerical employees, managerial employees, confidential employees, professional employees, guards, and supervisors as defined by the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters.

#### **A. Election Details**

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on March 3, 2021. Voters must return their mail ballots so that they will be received by close of business on March 24, 2021.<sup>19</sup> The mail ballots will be counted on March 31, 2021 at a time and location to be determined, either in person or otherwise, after consultation with the parties.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 p.m. on March 10, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

#### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **February 14, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

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<sup>19</sup> The Petitioner waived 8 days of its 10-day entitlement to the voter list.

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **February 26, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found



appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Signed this 24<sup>th</sup> day of February 2021.



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**THOMAS GOONAN**  
Regional Director, Region Four  
National Labor Relations Board

